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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

NO. 628

THOMAS D. MOORMAN, Administrator of the Estate of Helen Mar Hunnicutt, deceased, et al.,
Petitioners

v.

THE AUSTIN PRESBYTERIAN THEOLOGICAL SEMINARY, et al.,
Respondents

On Petition for Writ of Certiorari to the Supreme Court of Texas

MEMORANDUM BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Question Presented

As best Respondents are able to determine, the question presented for review is whether the determination by the Supreme Court of Texas that Petitioners had no point in their brief in the Texas Court of Civil Appeals invoking the jurisdiction of that court to determine whether the finding of the jury was contrary to the overwhelming weight and preponderance of the evidence constituted a "false, unreasonable, discriminatory, and arbitrary treatment of the record" and

denied Petitioners the equal protection of the laws or deprived them of property without due process of law.

Statement of the Case

Petitioners' statement of the case is accurate except that it misstates the holding of the Texas Court of Civil Appeals. Petitioners state at Pages 4 and 6 of their application that the Court of Civil Appeals held the evidence at trial was insufficient to support the verdict of the jury and that such verdict was contrary to the great weight of the evidence (a question of fact under Texas law). Actually, there is nothing in the opinion of the Court of Civil Appeals to indicate that it thought Petitioners raised this question. That Court carefully limited its holding to the question of conclusive evidence or no evidence (a question of law in Texas) and showed an awareness that Petitioners' points of error in that Court were procedurally incapable of presenting the fact question on the evidence. See the portions of the Court of Civil Appeals' opinion appearing at Pages 35 and 38 of Petitioners' application as Appendix A.

Argument

1. There is no merit in Petitioners' application because the Supreme Court of Texas decided this case correctly and applied established state law in so doing. Petitioners simply failed to raise by point of error in the Court of Civil Appeals and thereby irrevocably waived any possible complaint on the fact question of the great weight or sufficiency of the evidence at trial. Petitioners' only complaints in the Court of Civil Appeals were of rulings by the trial court at stages where the question of the sufficiency or great weight of the evidence is not procedurally relevant and cannot be raised. For a case directly in point, see *McDonald vs.*

New York Central Mutual Fire Insurance Company, 380 SW 2d 545 (Tex. Sup. 1964). See also the very lucid article by then Associate Justice and now Chief Justice Robert W. Calvert entitled *"No Evidence" and "Insufficient Evidence" Points of Error,* at 38 Tex. Law Rev. 361 (1960).

2. Petitioners' application lacks merit because even if it be assumed, *arguendo,* that the Supreme Court of Texas misapplied its appellate rules regarding the proper method of presentation of points on appeal, its misapplication involves only local or state law and presents no federal question. A familiar limitation upon this Court's authority is that it respects the power and privilege of "each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise." *John vs. Paullin,* 231 US 583, 585 (1913) and numerous cases therein cited. The exercise of this power by a state court is not subject to review. Especially is this true where there is no suggestion that the state court has acted to evade a constitutional issue. *Nickel vs. Cole,* 256 US 222 (1921), Opinion of the Court by Mr. Justice Holmes. There certainly is no such suggestion in the instant case. The *John* and *Nickel* cases are reaffirmed and pertinent language therefrom quoted by the Court with approval in *Wolfe vs. State of North Carolina,* 364 US 177, 195 (1960).

3. Respondents would point out in addition that the constitutional question or theory raised by Petitioners was not adequately presented for decision to the Texas Supreme Court as required. The attention devoted by Petitioners in that Court to their claimed federal question consisted of roughly one-half page in their Motion for Rehearing which does not appear to include all

that Petitioners now argue. This scant treatment indicates how little regard Petitioners themselves have for the merits of their "federal question." This treatment also failed utterly to explain the question with requisite clarity. Petitioners did not raise the question appropriately below and it is thus not available to them here.

Conclusion

For the foregoing reasons, Respondents pray that Petitioners' application for writ of certiorari be denied.

Respectfully submitted,

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